

# Objectionable Publications and Indecency Legislation Bill

Objectionable Publications and Indecency Legislation Bill (PCO17290/1.7) – Consistency with the New Zealand Bill of Rights Act 1990

14 MAY 2013

1. We have considered this Bill for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”).

2. In our opinion the Bill is consistent with the Bill of Rights Act.

## Outline of the Bill

3. The purpose of this Bill is to achieve a reduction in the incidence of offences involving child pornography by increasing the penalties for those offences and removing obstacles to their detection and prosecution.

4. The Bill proposes amendments to the Films, Videos, and Publications Classification Act 1993, Customs and Excise Act 1996, and Crimes Act 1961. In summary, the Bill:

4.1 increases penalties for possessions, import, export, supply, distribution, and making of objectionable materials (cll 4, 6, 10);

4.2 clarifies that a person can have possession of an electronic publication without saving it (or a copy of it) (cl 5);

4.3 provides a presumption of imprisonment for repeat child pornography offenders (cl 7);

4.4 removes the Attorney-General’s leave requirement for public prosecutions of objectionable publications offences (cll 8, 12); and

4.5 creates a new criminal offence of indecent communication with a young person (under 16 years) (cll 13).

## Consistency with s 14 (Freedom of Expression)

5. Any enactment that criminalises the act of dealing with a publication or other communication (see cll 5 and 13) will cause a *prima facie* inconsistency with section 14 of the Bill of Rights Act. However, constraining the creation, possession and trafficking of “objectionable” material is a demonstrably justified limit on that freedom, provided the scope of what is regarded as objectionable reflects an assessment of the harm occasioned by that material. In the course of a criminal prosecution, the Court will determine whether any publication is objectionable and must do so in a manner that is consistent with the right.

6. Freedom of expression can also be limited by the mere threat of prosecution. Clause 8 of the Bill will remove the existing requirement that your consent be obtained for any prosecution concerning objectionable publications that is commenced by the New Zealand Police, Customs or the Department of Internal Affairs.

7. The removal of that additional requirement does not cause an unjustified limit on the exercise of the right guaranteed by s 14. State agencies are required to act in a manner that is consistent with the Bill of Rights Act, and make their prosecution decisions under the supervision of the Solicitor-General. Private prosecutions will still require your consent.

### **Consistency with s 9 - Presumption of imprisonment for repeat offenders**

8. The Bill provides in new s 132B for a presumption of imprisonment for repeat offences involving child pornography. The presumption will arise even if the prior offence was committed before the amendment comes into force. It can be displaced, if the sentencing Judge considers that the offender should not be imprisoned having regard to the particular circumstances of the repeat offence and those of the offender.

9. The presumption only arises for what are described as specified publications offences, which are defined so as to include only the offences of distributing, possessing, or exhibiting objectionable publications that are objectionable because of their depiction of the sexual exploitation of children and young persons. These are all offences containing a *mens rea* element (i.e. knowledge that the publication is objectionable) and all carry a maximum sentence of 5 or 10 years imprisonment.

10. The fact that the presumption of imprisonment may be triggered by a conviction that occurred before the presumption became law does not give rise to a retrospective penalty. The existence of prior convictions for similar offences has always been regarded as an aggravating feature in sentencing and for serious offending will commonly take an offender beyond the threshold for a custodial sentence.<sup>1</sup> The presumption does not add any additional penalty to the earlier offence. It operates only on the sentencing for the repeat offence and its effect is only to constrain the sentencing Judge's discretion as to the appropriate sentence.

11. Any presumption of imprisonment engages s 9 (freedom from disproportionately severe punishment), and would be inconsistent with that right if its effect was to require a Judge to impose a sentence of imprisonment that would be a grossly disproportionate response to the offending.

12. The presumption proposed in this Bill preserves a discretion for the sentencing Judge to impose a sentence less than imprisonment if he or she considers that imprisonment would not be appropriate having regard to the particular circumstances of the repeat offence or the particular circumstances of the offender, including their age if they are under 20.

13. The residual discretion to impose a sentence less than imprisonment is sufficient to prevent any inconsistency with s 9. A Court would never be bound to apply the

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<sup>1</sup> See, for example, *R v L (TP)* [1987] 2 SCR 309 and *Oyler v Boles* 368 U.S. 448 (1962).

presumption if the circumstances of the case or the offender would make imprisonment an excessive sentence.

### **Consistency with s 25(c) – Reverse onus provision**

14. New section 124A (cl 13) provides for a new offence of indecent communication with a person aged under 16, which is directed to fill a gap in current offence provisions.<sup>2</sup> Under new s 124A(3) and (4), an accused person may only rely on defences that he or she believed that person to be of or over that age and/or that he or she did not know that the material was indecent if that person proves that defence.

15. By requiring an accused person to prove a defence to a criminal charge, these provisions limit the right to presumption of innocence affirmed by s 25(c) of the Bill of Rights Act. However, that limit can here be justified on the basis that:<sup>3</sup>

15.1 The two defences each rely upon matters that are exclusively within the knowledge of an accused; and

15.2 The reverse onus provisions have the effect of requiring those at risk of committing the offence to take steps not only to avoid offending, but also to avoid the conduct that reflects that offending.

16. This advice has been prepared with the help of Assistant Crown Counsel Mia Gaudin.

Yours sincerely

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<sup>2</sup> Explanatory note, p 3.

<sup>3</sup> See *R v Wholesale Travel Group Inc* [1991] 3 SCR 154; *Attorney-General (Hong Kong) v Lee Kwong Kut* [1993] AC 951 (PC) at 969; *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, above n 11, at [41], [84]–[85] and [90]. The point was noted with possible approval but not decided in *R v Hansen* [2007] 3 NZLR 1, at [43], [66] and [227].

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